IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 39265-8-II

CHRISTA ALBICE, a married woman, and BART A. TECCA and KAREN L. TECCA, husband and wife,

Appellants,

vs.

PREMIER MORTGAGE SERVICES OF WASHINGTON, INC., a Washington Corporation; OPTION ONE MORTGAGE CORPORATION, a California Corporation; RON DICKINSON and "JANE DOE" DICKINSON, husband and wife,

Respondents,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

REPLY BRIEF OF APPELLANTS

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I. SUMMARY OF REPLY

The central issue on appeal is whether the claim of Ms. Albice and the Teccas to the property should prevail over that of the Dickinsons where the foreclosing trustee did not have statutory authority to conduct the foreclosure sale. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); *CHD v. Boyles*, 138 Wn.App. 131, 157 P.3d 415 (2007). In their responsive brief, the Dickinsons concede the sale took place more than 120 days after the date originally set for sale, and that the Teccas tendered sufficient funds to cure any delinquencies more than 11 days prior to the sale date. Further, the Dickinsons submitted no evidence at trial to rebut the evidence that the trustee had no corporate officer who was a Washington resident at the time of the foreclosure sale. For these reasons, the trial court should be reversed and judgment should be entered in favor of Ms. Albice and the Teccas.

The Dickinsons begin their response by arguing Ms. Albice and the Teccas' presentation of the issues, "is confusing and may mislead this Court as to the trial court's rulings below." Brief of Respondents, page 1. Ms. Albice and the Teccas are appealing not only the ruling of the lower court at trial, but also the summary judgment rulings. Ms. Albice and the Teccas have assigned error to all of the findings of fact and conclusions of

law entered by the court that they believe support the judgment in favor of the Dickinsons.

The Dickinsons also ask the court to strike Appendix F to the brief of Ms. Albice and the Teccas on the basis it is not included in the record on appeal. That motion should be denied since the document is found at CP 299.

Ms. Albice and the Teccas agree with the Dickinsons that in the context of post sale challenges to non-judicial deed of trust foreclosures the court must be mindful of ensuring the Deed of Trust Act's goals of, "promoting efficient, inexpensive, *and procedurally sound foreclosures* and the stability of land titles." *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007) (emphasis added); *See also Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). It should be noted that this case does not fall within the *Plein v. Lackey* rule on post sale challenges to a foreclosure sale because Ms. Albice and the Teccas are contesting the procedure of the sale, not the underlying loan obligation. *Compare Moon v. GMAC Mortgage Corporation*, 2009 WL 3185596 (W.D. Wash. 2009) (copy attached), *CHD v. Boyles*, 138 Wn. App. 131, 157 P.3d 415 (2007), and *Cox v. Helenius*, 103 Wn. 2d 383, 693 P.2d 683 (1985) to *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003). Because the foreclosure in this case was not procedurally sound, and because Ms.

Albice and the Teccas did not know that the sale was even taking place until after it happened, the sale should be set aside. *Id.*

II. ARGUMENT

A. THE DICKINSONS WERE NOT BONA FIDE PURCHASERS FOR VALUE BECAUSE THEY KNEW OR SHOULD HAVE KNOWN ABOUT THE DEFECTS IN THE SALE AND THE PURCHASE PRICE OF THE PROPERTY WAS SUBSTANTIALLY BELOW THE PROPERTY'S FAIR MARKET VALUE.

Ms. Albice and the Teccas are not arguing that the form of the trustee's deed in this case was in any way statutorily defective, or by itself made the trustee's sale void. Rather, Ms. Albice and the Teccas argue that the deed did not contain specific recitations of fact upon which the Dickinson's could rely to establish themselves as bona fide purchasers for value. If the Dickinsons were on notice of the defects in the sale, they cannot close their eyes to those defects and claim to be bona fide purchasers for value. *Steward v. Good*, 51 Wn. App. 509, 513, 754 P.2d 150 (1988).

In support of their argument they were bona fide purchasers for value, the Dickinsons first respond that Mr. Dickinson was not familiar with the 120 day limitation on foreclosure sales. However, ignorance of the law, or a mistake as to the law, is not an excuse if the rights of third persons (in this case Ms. Albice and the Teccas) are at stake. *Harvey v.*

Charles R. McCormick Lumber Co. of Delaware, 149 Wn. 368, 376, 271 P. 65 (1928). The Dickinsons admit that Mr. Dickinson's claim of ignorance of the 120 day rule was not before the court at the time of the summary judgment motion. Brief of Respondents, page 23-24. The Dickinsons argue this shows some sort of impropriety on the part of Ms. Albice and the Teccas in not bringing this evidence to the court's attention. *Id.* Based upon *Harvey* and similar cases, Ms. Albice and the Teccas did not believe Mr. Dickinson's claim of ignorance was relevant or material. If Mr. Dickinson felt that fact was relevant or material it was his duty to submit such evidence, or ask for additional time to do so. CR 56(e) and (f). His failure to do so constitutes waiver of this issue. CR 56, *Ashcraft v. Wallingford*, 17 Wn. App. 853, 565 P.2d 1224 (1977).

In any event, the critical inquiry is whether Mr. Dickinson was aware of the *fact* that more than 120 days had passed since the day set for sale; not whether he was aware of the law on the subject. *See Harvey v. Charles R. McCormick Lumber Co. of Delaware*, 149 Wn. 368, 376, 271 P. 65 (1928). In the present case, Mr. Dickinson had a copy of the Notice of Trustee's Sale, which states the date scheduled for sale was September 8, 2006. CP 444, 526. Therefore Mr. Dickinson knew facts sufficient to calculate that the sale took place more than 120 days after it was originally scheduled.

Next, the Dickinsons argue Mr. Dickinson only has a high school education and therefore it was unfair to characterize him as some sort of expert in this area. This argument should be rejected because at trial, the Dickinson's themselves established Mr. Dickinson as a real estate expert. RP 65-73. Further, Mr. Dickinson admits the evidence submitted by Ms. Albice and the Teccas about his extensive experience and knowledge of foreclosures is otherwise true. Respondent's Brief, 22-23.

Finally, the Dickinsons argue the sale price was not substantially below fair market value because there was a range of values before the court, and Mr. Dickinson's own value was not considered. Brief of Respondents, 31-35. As for Mr. Dickinson's own estimate of value not being considered, again Ms. Albice and the Teccas did not believe his estimates were admissible or material. *See* RP 71-72; CR 56 (particularly subsection (f)). Regardless, by failing to submit such information to the court on summary judgment, the Dickinson's cannot raise this issue for the first time on appeal. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 565 P.2d 1224 (1977).

A careful review of the evidence discussed by the Dickinsons in their brief shows there was only one opinion as to the value of the property at the time of the foreclosure for the court to consider on summary judgment. That was the appraisal submitted by Mr. Preppernau as of

November 17, 2007, showing the property was worth $950,000.00. CP 386-410. Exhibit K to Ms. Tecca's declaration[1] was an appraisal as of April 11, 2003, which is nearly four years prior to the foreclosure sale in this case. CP 1038-1049. It was submitted in part to demonstrate that even four years before the sale, the property was worth much more than the $130,000.00 paid by Mr. Dickinson. CP 369-372, 1001. Even then, the Dickinsons admit this is only about 21.4% of the fair market value at the time of the sale. Brief of Respondents, page 32. This is consistent with Mr. Dickinson's partner showing up at the foreclosure sale with at least $450,000.00. CP 373. This demonstrates that the Dickinsons were aware the sale price was grossly inadequate. Given the grossly inadequate sales price, the Dickinsons cannot claim the protection of bona fide purchasers *for value* provided in RCW 61.24.040(6). *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); *Steward v. Good*, 51 Wn. App. 509, 754 P.2d 150 (1988).

[1] This declaration was submitted May 24, 2007, in response to a motion to dismiss the lender and trustee. CP 995-1067. This was several months prior to Mr. Preppernau's appraisal being available. *Compare* CP 298 to 995. It turned out Ms.Tecca's estimate of the property being worth at least $750,000 was accurate. CP 386-410, 1001.

B. THE TRUSTEE HAD NO AUTHORITY TO CONDUCT A NON-JUDICIAL DEED OF TRUST FORECLOSURE MORE THAN 120 DAYS AFTER THE ORIGINAL DATE SET FOR SALE.

There is no dispute that the foreclosure sale in this case took place more than 120 after the date originally set for sale. This is a violation of RCW 61.24.040(6). CP 183-184. The Dickinsons respond by arguing that Ms. Albice and the Teccas entered into an agreement waiving the protection of the statute, and that there are other circumstances where a sale can be continued beyond 120 days. Brief of Respondents, 28-31. However, for the reasons stated below, the Forbearance Agreement referred to by the Dickinsons does not constitute a waiver of the statute, and the statutory continuances referred to by the Dickinsons all require additional notice prior to conducting a sale, which was not provided in this case.

Given that the 120 day rule in RCW 61.24.040 is a statutorily created right, a waiver should be clear.

> Statutory rights should ordinarily be waived only by clear affirmative words or actions, and at least one state requires a waiver of statutory rights must be express and explicit. In some states a flexible approach has been adopted regarding acceptable form of voluntary waivers when statutory rights, rather than constitutional rights, are at issue.
> ...
> Further, a statutory right may not be waived or released if such waiver or release contravenes the purpose of the statute.

> When a statute contains provisions that are founded on public policy, such provisions cannot be waived by a private party if such a waiver thwarts the legislative policy which the statute was designed to effectuate. The protection of statutes designed to protect the public as well as individuals cannot be waived by an individual.

28 Am. Jur. 2d Estoppel and Waiver § 214 (copy attached). As stated above, one of the policies of Washington's Deed of Trust Act is to ensure procedurally sound nonjudicial foreclosures. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007); *See also Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Similarly,

> Since the statutes allowing for nonjudicial foreclosure dispense with many protections commonly enjoyed by borrowers, "lenders must strictly comply with the statutes, *and courts must strictly construe the statutes in the borrower's favor.*"

CHD, Inc. v. Boyles, 138 Wn. App. 131, 137, 157 P.3d 415 (2007) *quoting Amresco Independence Funding, Inc. v. SPS Props., L.L.C.*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005) (emphasis added). Finally, with regard to time limits, the Washington Supreme Court has stated, "if a time limit is jurisdictional, instead of a normal statute of limitation, waiver, estoppel, and the doctrine of equitable tolling cannot be argued." *Hazel v. Van Beek*, 135 Wn.2d 45, 61, 954 P.2d 1301, 1308 (1998) *citing State v. Duvall*, 86 Wn. App. 871, 874, 940 P.2d 671(1997). It is the position of Ms. Albice and the Teccas that since the trustee's authority to conduct

non-judicial deed of trust foreclosures arises solely from the statute, the 120 day rule is a jurisdictional rule since the trustee has no legal authority to conduct a sale after that time has expired. RCW 61.24.040(6).

The Dickinsons argue that Ms. Albice and the Teccas entered into a Forbearance Agreement with Option One and therefore waived the protections of RCW 61.24.040(6). The Dickinsons cite no authority in support of their argument that entering into a forbearance agreement is "one of those circumstances" permitting continuances beyond 120 days. *Quoting* Brief of Respondents, 28. On that basis alone this argument should be dismissed. RAP 10.3(a)(6), (b); *See also In re Fuel Tax or Probate Assessment*, 129 Wn. App. 556, 119 P.3d 889 (2005); *State v. Marintorres*, 93 Wn. App. 442, 969 P.2d 501 (1999).

In any event, Ms. Albice never entered into a forbearance agreement with Option One, Premier, or anyone else in connection with this property. CP 470, 993.

Further, the Forbearance Agreement specifically stated:

> All of Borrowers' rights and responsibilities under, and all of the terms and conditions of the Note and Security Instrument, shall remain in full force and effect except as expressly modified by this Agreement.

CP 469. The Deed of Trust signed by Ms. Albice and the Teccas says in bold text:

> In such event [default], Lender, at its option, *and subject to applicable law*, may then or thereafter invoke the power of sale and/or any other remedies or take any other actions *permitted by applicable law*.
> ...
> Trustee and Lender shall take such action regarding notice of sale and shall give such notices to Borrower and to other persons *as applicable law may require...Trustee may postpone sale of the Property for a period or periods permitted by applicable law*....

CP 976 (paragraph 21) (emphasis added). Because there is no clear waiver of the 120 day rule in the Forbearance Agreement, because the Forbearance Agreement says the Teccas retain their rights under the Note and Security Agreement, and because the Deed of Trust only permits postponement of the sale for periods of time permitted by applicable law, the court should decline to adopt this argument advanced by the Dickinsons.

The Dickinsons also rely on RCW 61.24.130(4) to argue that sales can be continued beyond the 120 rule set forth in RCW 61.24.040(6). But that statute applies to a very unique set of cases: bankruptcy. Further, the statute requires the trustee to provide additional notice of the sale not less than 45 days from the date of the order dissolving the stay. RCW 61.24.130. All of the statutes permitting continuances beyond 120 days (including the newly revised version of RCW 61.24.040(6)) require some

sort of additional notice to the borrowers prior to proceeding with the foreclosure sale. In the present case, no such notice was ever given.

C. THE TRUSTEE'S SALE SHOULD HAVE BEEN DISCONTINUED BECAUSE MS. ALBICE AND THE TECCAS TENDERED AN AMOUNT SUFFICIENT TO COMPLETELY CURE THE DEFAULT MORE THAN ELEVEN (11) DAYS PRIOR TO THE FORECLOSURE SALE.

The Dickinsons do not directly dispute that the Teccas tendered funds sufficient to cure their default more than 11 days prior to the foreclosure sale. Instead, they argue that this issue was not raised by Ms. Albice or the Teccas in the lower court. Brief of Respondents, 4. But that is not the case. This issue was raised by Ms. Albice and the Teccas in their complaint. CP 641, 642, 644. It was also raised and briefed by Ms. Albice and the Teccas on summary judgment. CP 334-336, 340-341. On summary judgment, Judge Foscue ruled, "Plaintiffs' motions on other grounds are closely related to those I have already addressed and will be denied." CP 186. The two written orders following the summary judgment motion denied this motion. CP 101, 145.[2] At the time of trial, the trial court would not permit any testimony unrelated to whether Premier had an officer residing in the state at the time of the foreclosure sale. RP 11:20.5-25.5. The Dickinsons have provided no other response

[2] To the extent the citation to the record for Appellants' Third Assignment of Error were incomplete, counsel apologizes and hopes any deficiency is now cured as provided in *McGovern v. Smith*, 59 Wn. App. 721, 801 P.2d 250 (1990).

to this argument. Because there is no factual dispute that the Teccas tendered sufficient funds to cure their default more than 11 days prior to the sale, the trial court should be reversed because the sale should have been discontinued at that time. RCW 61.24.090; *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

Regarding whether the amount tendered by the Teccas was sufficient to cure the default, the Dickinsons imply that it was not. The Dickinsons say, "...that payment was being returned, stating the reason therefore, i.e. that the payment was not enough to bring the loan current." Brief of Respondents, 14. The Dickinsons' citation to the record (CP 279-280, 302) does not support this statement. Those portions of the record show the payment was being rejected as late under the Forbearance Agreement, not because it was too small an amount to cure. Further, the representative of Premier/Option One, Ms. Lisa Clary, actually testified that the only reason the payment was rejected was because it was late under the Forbearance Agreement. CP 259. Ms. Clary also testified that there were no other breaches of the Forbearance Agreement. CP 259:14-16. Ms. Clary testified that when the last payment was rejected, Premier/Option One was already holding about $5,300.00 in unapplied payments made by Ms. Albice and the Teccas. CP 270:12-271:13. The fact that Premier/Option One accepted all payments under the Forbearance

Agreement late except for this last one, and the fact they were holding so many unapplied payments at that time, simply demonstrates Premier/Option One's bad faith in the foreclosure process and violation of the foreclosure statute's procedures.

D. THE FORECLOSURE SALE WAS VOID BECAUSE PREMIERE DID NOT HAVE A CORPORATE OFFICER RESIDING IN WASHINGTON AT THE TIME OF THE FORECLOSURE AND THEREFORE IT WAS NOT LEGALLY QUALIFIED TO CONDUCT A NON-JUDICIAL DEED OF TRUST FORECLOSURE SALE.

The critical question on the issue of whether Premier maintained a Washington resident officer at the time of the foreclosure is whether there was any evidence at trial as to who that officer was in late 2006 and early 2007. As they did at trial, the Dickinsons argue that because Teresa Harding was appointed an officer in May 2004[3] she was therefore an officer in 2006 and 2007. This is despite the fact Ms. Harding conceded that she had no personal knowledge whether she was that officer in 2006 and 2007. RP 36-37. The only evidence submitted at trial showing who the officers were in 2006 and 2007 are Trial Exhibits 34 and 35. Ex. 34, 35. These are the 2006 and 2007 annual reports filed by Premier with Washington's Secretary of State. Ex. 34, 35. By law, these reports must list all of Premier's officers. RCW 23B.16.220; WAC 434-110-120. Ms.

[3] Ms. Harding was not even residing in Washington until October 2004. CP 105.

Harding's name does not appear anywhere on these reports. Ex. 34, 35. No other Washington residents appear on these reports. *Id.* Therefore, there was no evidence at trial of Premier maintaining a Washington resident officer at the time of the foreclosure in this case.

The Dickinsons argue, without submitting any evidence in support of the argument, that the corporate records filed with the Secretary of State are false and should not be believed, while the internal corporate records from two to three years before the date in question are conclusive. Brief of Respondents, 35-40. The Dickinsons rely on language in Article II, Section 2 of Premier's Bylaws, which says an officer shall serve until his or her successor is elected. Ex. 8. But Exhibits 34 and 35 show that there were at least two elections following Ms. Harding's appointment in 2004, and that she was not elected or re-elected an officer at either time. Ex. 34, 35. There is no dispute that Premier's annual reports must list all officers of the company. RCW 23B.16.220; WAC 434-110-120. No witness at trial, not even Ms. Harding, testified that Premier incorrectly, inaccurately, or incompletely filled out and filed their annual reports.

The Dickinsons argue Ms. Albice and the Teccas fail to cite any cases in support of this conclusion, and rely on *Stouffer-Bowman, Inc. v. Webber*, 18 Wn. 2d 416, 139 P.2d 717 (1943), to argue that Premier's 2006 and 2007 annual reports were incomplete. Curiously, while the

Dickinsons submitted internal documents to show Ms. Harding was appointed an officer in 2004, they submitted no internal documents of Premier for the time period of 2006 to 2007 to rebut the annual reports for those years. The *Stouffer-Bowman* case does not provide any assistance on this issue. The *Stouffer-Bowman* case involved a corporation's complete failure to file its annual report. We do not have that situation here. In the present case, Premier filed annual reports certifying that the officers on the report constituted *all* of its officers. RCW 23B.16.220; WAC 434-110-120. The Dickinsons never disputed or rebutted this representation through any evidence or testimony at trial for the time period of 2006 and 2007. Therefore, it was error for the trial court to find that Ms. Harding was an officer in 2006 and 2007, solely because she was an officer in 2004.

Finally, this issue should not have been allowed to proceed to trial. For the reasons stated in the Brief of Appellants at Section IV(D)(1), the Dickinsons' motion for reconsideration was improper. Brief of Appellants, 37-41. The Dickinsons respond by arguing there is no "one reconsideration motion" limit, citing *Barry v. USAA*, 98 Wn. App. 199, 989 P.2d 1172 (1999). Brief of Respondents, 34-35. Ms. Albice and the Teccas agree. They have never argued that there is a limit to one motion for reconsideration. Rather, as acknowledged in *Barry* and set forth in CR

59(j), the Dickinson's motion for reconsideration was not permitted because:

> ...the rule declares that if a motion for reconsideration is made and heard before the entry of judgment, *no further motion may be made* for a new trial, for reopening judgment, to alter or amend the judgment, or to amend the findings "*without leave of court first obtained for good cause shown.*"

Barry v. USAA, 98 Wn. App. 199, 203, 989 P.2d 1172 (1999) (quoting CR 59(j)) (emphasis added). Further, the court in *Barry* observed that the second motion for reconsideration in that case was, "at any rate considered by the trial court without challenge." *Barry v. USAA*, 98 Wn. App. 199, 203, 989 P.2d 1172 (1999).

In the present case, Ms. Albice and the Teccas filed the first motion for reconsideration before entry of judgment on May 20, 2008. CP 174-181. Judgment was entered June 2, 2008. CP 143-146. It was only after entry of judgment that the Dickinsons filed the second motion for reconsideration. CP 137-142. The rule says, "no further motion may be made...without leave of court for good cause shown...." *Barry v. USAA*, 98 Wn. App. 199, 203, 989 P.2d 1172 (1999) (quoting CR 59(j)). The Dickinsons did not obtain leave of court nor demonstrate good cause for their motion. CP 137-142. Further, unlike the party in *Barry*, Ms. Albice and the Teccas did object to the Dickinsons' motion. CP 113-129. For

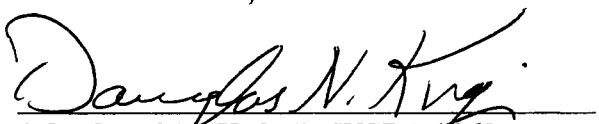
these reasons the present case is distinguishable from *Barry* and the summary judgment in favor of Ms. Albice and the Teccas should not have been vacated.

III. CONCLUSION

There is no dispute that the non-judicial deed of trust foreclosure in this case was procedurally flawed. Each procedural flaw was of the type and nature that deprived the trustee of legal authority to conduct a valid foreclosure sale, thereby making the sale void. For these reasons the trial court should be reversed and judgment should be entered in favor of Ms. Albice and the Teccas setting aside the foreclosure sale and quieting title in their names.

Respectfully submitted this 21st day of January, 2010.

BLADO KIGER, P.S.



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 21st day of January, 2010, she placed with ABC Legal Messengers, Inc. an original Reply Brief of Appellants and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

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DATED this 21st day of January, 2010, at Tacoma, Washington.

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Only the Westlaw citation is currently available.

United States District Court, W.D. Washington, at Seattle.
Judith MOON, an individual, Plaintiff,
v.
GMAC MORTGAGE CORPORATION, d/b/a Ditech.com, a Pennsylvania Corporation, et al., Defendants.
No. C08-969Z.

Oct. 2, 2009.

West KeySummary

Damages ⚖208(6)
115k208(6) Most Cited Cases
A mortgagee was precluded from summary judgment as a mortgagor could show actual damages from a violation of the Real Estate Settlement Procedures Act (RESPA). Although two courts had concluded that RESPA did not permit recovery of emotional distress damages, other courts had consistently found that actual damages included emotional distress damages. Whether the mortgagor could adequately quantify her alleged emotional distress was an issue for the trier of fact. Real Estate Settlement Procedures Act of 1974, § 6(f)(1)(A), (B), 12 U.S.C.A. § 2605(f)(1)(A), (B); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.
Shelly Crocker, Crocker Kuno/Resolve Legal, PLLC, Seattle, WA, for Plaintiff.

Antoinette Marie Davis, Taryn M. Darling Hill, Crocker Kuno/Resolve Legal, PLLC, Erin McDougal Stines, Bishop, White & Marshall, Seattle, WA, for Defendants.

ORDER
THOMAS S. ZILLY, District Judge.

***1** THIS MATTER comes before the Court on cross-motions for summary judgment. Having reviewed all papers filed in support of and in opposition to each motion, the Court hereby ORDERS:

(1) Defendants' motion for summary judgment, docket no. 76, is GRANTED IN PART and DENIED IN PART;

(2) Plaintiff's motion for partial summary judgment against defendant GMAC Mortgage Corporation d/b/a ditech.com ("GMAC"), docket no. 83, is GRANTED IN PART and DENIED IN PART;

(3) Plaintiff's motion for partial summary judgment against defendant First American Title Insurance Company ("FATIC"), docket no. 84, is DENIED;

(4) Plaintiff's motion for partial summary judgment against defendant Executive Trustee Services, LLC ("ETS"), docket no. 85, is DENIED;

(5) With the exception of plaintiff's Fifth Cause of Action under the Real Estate Settlement Procedures Act and plaintiff's Sixth Cause of Action as against only GMAC, plaintiff's claims are DISMISSED with prejudice, but plaintiff will be permitted to assert any violations of the Truth in Lending Act as defenses to defendant GMAC's counterclaim; and

(6) Defendants Mortgage Electronic Registration Systems, Inc., First American Title Insurance Company, and Executive Trustee Services, LLC, are DISMISSED from this action with prejudice.

Background

This action involves two loans that Jimmy Moon and plaintiff Judith Moon obtained from GMAC in April 2006 to refinance their Snohomish residence. One of the loans was for 80% and the other loan was for 20% of the estimated value of the home. The "80/20" loans were for the following amounts, durations, and interest rates:

. $180,000 for 30 years at 7% per annum
. $45,000 for 25 years at 10.75% per annum.

On August 9, 2007, plaintiff's husband, Jimmy Moon, died. The sequence of the events that followed is the focus of many of plaintiff's claims, and

it is therefore presented in chronological rather than narrative form.

September 7, 2007 Plaintiff sends a letter to GMAC requesting "complete copies of all our loan documents," complaining that she "tried to contact someone at ditech.com several times to inform you that my husband passed away unexpectedly last month, but have not received any return call or correspondence," and advising that she had retained an attorney who was authorized to speak with GMAC on her behalf. Exh. C to Stines Decl. (docket no. 77).

November 2007 Plaintiff is laid off.

January 1, 2008 Plaintiff's attorney sends a letter to GMAC requesting "complete copies of all the loan documents." Exh. 6 to Davis Decl. (docket no. 86).

January 24, 2008 Plaintiff's attorney sends a letter to GMAC requesting "complete copies of all the loan documents." Exh. 7 to Davis Decl. (docket no. 86).

March 3, 2008 Homecomings Financial, LLC, a GMAC company, sends plaintiff's attorney "the requested documentation." Exh. 8 to Davis Decl. (docket no. 86).

March 17, 2008 GMAC sends plaintiff (and her deceased husband) a letter offering to accept $11,122.39 as full payment on the second ($45,000) mortgage. Exh. H to Zeitz Decl. (docket no. 78).

*2 May 23, 2008 Plaintiff files suit in Snohomish County Superior Court against GMAC, as well as Mortgage Electronic Registration System, Inc. ("MERS"), Transnation Title Co., and FATIC. [FN1] Exh. A to Notice of Removal (docket no. 1).

> FN1. MERS is the beneficiary of the deeds of trusts executed by plaintiff and her husband in connection with the loans from GMAC. Exhs. C & D to Zeitz Decl. (docket no. 78). Transnation Title Co. was the trustee named in the deeds of trust, but it was removed as trustee in January 2008, and plaintiff's claims against Transnation Title Co. were dismissed in May 2009 pursuant to a stipulation of the parties. Stip. & Order (docket no. 60). FATIC is Transnation Title Co.'s successor as trustee for the deeds of trust at issue. Exh. A to De La Torre Decl. (docket no. 80).

May 27, 2008 Snohomish County Superior Court issues a temporary restraining order enjoining the Trustee's sale scheduled for May 30, 2008. Exh. C to Khan Decl. (docket no. 88).

May 30, 2008 Plaintiff's attorney Zeshan Khan drives to Snohomish County Superior Court and sees that plaintiff's property is still listed for sale at auction. Khan Decl. at ¶¶ 5-6 (docket no. 88).

June 20, 2008 Plaintiff's Snohomish County Superior Court case is removed to this Court. Notice of Removal (docket no. 1).

June 27, 2008 Plaintiff names ETS [FN2] as an additional defendant. Amended Complaint (docket no. 3).

> FN2. ETS acted as FATIC's agent for purposes of foreclosure proceedings. De La Torre Decl. at ¶ 3 (docket no. 80).

October 24, 2008 Injunction against foreclosure is dissolved due to plaintiff's failure to make monthly payments into the Court's Registry. Order (docket no. 46).

May 15, 2009 Trustee sells the property for $207,435.29. Exh. 16 to Davis Decl. (docket no. 86).

June 11, 2009 Trustee's Deed is recorded with Snohomish County. *Id.*

Discussion

Plaintiff makes three types of claims: (1) federal statutory claims, (2) state statutory claims, and (3) state tort claims. Defendants move for summary judgment as to all of plaintiff's claims. Plaintiff moves for partial summary judgment as to liability in three separate motions, one aimed at GMAC, one concerning FATIC, and one regarding ETS.

A. *Summary Judgment Standard*

The Court should grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When a properly supported motion for summary judgment has been presented, the adverse party "may not rely merely on allegations or denials in its own pleading." Fed.R.Civ.P. 56(e). Rather, the non-moving party must set forth "specific facts" demonstrating the existence of a genuine issue for trial. *Id.; Anderson,* 477 U.S. at 256. All "justifiable inferences" are to be drawn in favor of the non-moving party. *Anderson,* 477 U.S. at 255. When the record, however, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. *See Miller v. Glenn Miller Prod., Inc.,* 454 F.3d 975, 988 (9th Cir.2006).

B. *Federal Statutory Claims*

1. *Violation of Truth in Lending Act ("TILA") (Third Cause of Action)*

Plaintiff alleges that she did not receive from GMAC the documents and/or disclosures required by TILA. Amended Complaint at ¶ 6.2 (docket no. 3). Defendants have moved for summary judgment on this claim on the ground that it is barred by a one-year statute of limitations. Plaintiff has not provided much response to this argument, but she did assert in her Amended Complaint that the statute of limitations does not apply because the "TILA violations are defensive in nature to enjoin foreclosure." *Id.* at ¶ 6.3.

*3 The provision of TILA at issue provides in relevant part:

> Any action under this section may be brought in any United States district court ... within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.

15 U.S.C. § 1640(e). Thus, the statute differentiates between affirmative claims, which must be brought within one year, and defensive assertions of TILA violations, which carry no time limit. *See Roach v. Option One Mortgage Corp.,* 598 F.Supp.2d 741, 757 (E.D.Va.2009) (" § 1640(e) recognizes the fundamental difference between a borrower's initiation of a lawsuit by filing of a claim, which must occur within one year, and the defensive assertion of a TILA violation in an action brought by a TILA creditor, which a borrower may make at any time in *response* to the creditor seeking payment of the debt" (emphasis in original)).

The closing of the loans at issue occurred in April 2006. Plaintiff did not file suit until over two years later, in May 2008. Plaintiff offers no argument that the TILA violations took place any later than April 2006, or that she could not have discovered the violations until a time within one year before she filed suit. Thus, the one-year statute of limitations bars plaintiff's affirmative claim. It does not, however, preclude plaintiff from asserting any TILA violation as a defense to defendants' counterclaim. Defendants' motion for summary judgment is GRANTED IN PART and plaintiff's Third Cause of Action is DISMISSED. [FN3]

> FN3. By Minute Order dated August 24, 2009, docket no. 126, the Court denied plaintiff's motion to quash defendants' counterclaim, but gave plaintiff ten days to file an answer. Plaintiff's answer was filed on September 3, 2009, and asserted that "the amount of liability owed to Defend-

> ants should be offset ... by the damages to which Ms. Moon is entitled based upon the Court's findings regarding the claims addressed in her Complaint." Answer to Counterclaim, Affirmative Defenses at ¶ 5 (docket no. 135). The dismissal of plaintiff's Third Cause of Action is without prejudice to plaintiff's ability to maintain the same TILA claim as an affirmative defense.

2. Violation of Real Estate Settlement Procedures Act ("RESPA") (Fifth Cause of Action)

Plaintiff alleges that GMAC did not timely acknowledge or respond to her requests for copies of loan documents. Defendants assert that plaintiff's and her attorney's letters did not constitute "qualified written requests" and therefore did not trigger the statutory deadlines for acknowledgement or response. Defendants also argue that they timely responded to the attorney's letters sent in January 2008. Finally, defendants contend that plaintiff has not established a pattern of noncompliance.

The provisions of RESPA at issue provide in relevant part:

> (1) Notice of receipt of inquiry
> (A) In general
> If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days ... unless the action requested is taken within such period.
> (A) Qualified written request
> For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that--
> ***4** (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
> (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.
> (2) Action with respect to inquiry
> Not later than 60 days ... after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall--
> ....
> (C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes--
> (i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and
> (ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

12 U.S.C. § 2605(e)(1)(A), (e)(1)(B)(i) & (ii), & (e)(2)(C) (i) & (ii). An individual prevailing on a claim that the above-quoted provisions of RESPA were violated is entitled to:

> (A) any actual damages to the borrower as a result of the failure; and
> (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.

12 U.S.C. § 2605(f)(1)(A) & (B).

Defendants' contention that none of the three letters at issue constitute a qualified written request ("QWR") lacks merit. Defendants assert that plaintiff's letter dated September 7, 2007, is not a QWR because it is unsigned and does not state that the account is in error. Neither a signature nor an accusation of error, however, are requirements of a QWR. A QWR need only ask for information relating to servicing and provide the relevant names and account numbers. The September letter appears to do both. It requests copies of loan documents and

contains the names of the borrowers and account numbers at issue. *See* Exh. C to Stines Decl. (docket no. 77-4 at 3). Thus, the September letter constitutes a QWR to which GMAC failed to timely respond. *See In re Thorian,* 387 B.R. 50, 70 (Bankr.D.Idaho 2008) (interpreting the terms "inquiry" and "request" as used in RESPA to mean "a 'request for information' " and "the 'act or instance of asking for something,' " respectively, and concluding that a QWR must "allege an account error or seek some information from the loan servicer").

The two letters sent in January 2008 by plaintiff's attorney likewise qualify as QWRs. Defendants' assertion that the letters are not QWRs because they do not bear plaintiff's signature or are not accompanied by an authorization form containing plaintiff's and her husband's social security numbers runs contrary to the statutory definition of a QWR. RESPA specifically envisions that a QWR may be sent by a borrower's agent. *See* 12 U.S.C. § 2605(e)(1)(A). Both letters at issue indicate that the author, Shelly Crocker, had been retained by plaintiff to represent her. Both letters identify the borrowers and the account numbers. Both letters request copies of loan documents. *See* Exh. C to Stines Decl. (docket no. 77-4 at 4-6). Both letters are QWRs.

***5** Defendants appear to concede that they never acknowledged receipt of the three letters at issue, which they were required to do within 20 days of receiving the correspondence. They assert, however, that they complied with the request for documents within 60 days of receiving the January letters from plaintiff's attorney. Defendants appear to be correct, the first letter being dated January 1, 2008, the documents having been produced on March 3, 2008, and all intervening holidays and weekends being excluded, pursuant to RESPA, from calculation of the 60-day period. *See* 12 U.S.C. § 2605(e) (2). Moreover, defendants' faxed response contains the requisite name and telephone number of an employee who could provide further assistance. *See* Exh. 8 to Davis Decl. (docket no. 86).

Thus, GMAC's RESPA violations consist of: (1) failing to acknowledge receipt of three QWRs within the applicable 20-day (effectively 4 work-week) period; and (2) failing to timely respond to plaintiff's September request for documents. Defendants contend that, despite such violations, plaintiff's RESPA claim should be dismissed because she has failed to establish actual damages or a pattern of noncompliance. These arguments, however, do not warrant judgment as a matter of law.

In response to defendants' assertion that plaintiff has not shown actual damages, plaintiff contends that "most courts" have held that actual damages under RESPA include emotional distress. Response at 15 (docket no. 103). Defendants have offered no reply on this issue, and plaintiff appears to be correct. Although two courts have concluded that RESPA does not permit recovery of emotional distress damages, other courts that "have examined § 2605(f) have consistently found that 'actual damages' includes emotional distress damages." *Carter v. Countrywide Home Loans, Inc.,* 2009 WL 1010851 at *3 (E.D.Va.) (disagreeing with *Katz v. Dime Sav. Bank,* 992 F.Supp. 250 (W.D.N.Y.1997), and *In re Tomasevic,* 273 B.R. 682 (Bankr.M.D.Fla.2002)); *Ploog v. Homeside Lending, Inc.,* 209 F.Supp.2d 863, 870 (N.D.Ill.2002) (holding that "RESPA is a consumer protection statute and RESPA's actual damages provision includes recovery for emotional distress"). The *Carter* and *Ploog* decisions are well-reasoned and the Court likewise HOLDS that RESPA permits recovery of emotional distress damages. Whether plaintiff can adequately quantify her alleged emotional distress, however, is an issue for the trier of fact, and not an appropriate subject for summary judgment. *See Carter,* 2009 WL 1010851 at *5 ("such evidence as that concerning emotional distress is, by its very nature, not necessarily susceptible to precise quantification and, therefore, the Court declines to preclude, as a matter of law, the

ultimate fact finder's consideration of such evidence at trial").

As to defendants' denial of a pattern or practice of noncompliance with RESPA, plaintiff has established a genuine issue of material fact precluding summary judgment. The Court concludes that three successive failures to timely acknowledge receipt and a failure to timely respond to a request for loan documents might well constitute a pattern or practice of noncompliance, but defendants' explanation for such conduct might weigh against such finding, and the Court cannot decide this issue as a matter of law. The Court declines to address whether, if such pattern or practice were established, it would exercise its discretion to permit statutory damages in any amount, either equal to or below the limit of $1,000.

***6** In sum, defendants' motion for summary judgment as to plaintiff's Fifth Cause of Action is DENIED, and plaintiff's motion for partial summary judgment as to GMAC's violation of RESPA is GRANTED IN PART. The three letters sent by plaintiff or her attorney constitute QWRs, and GMAC failed to timely acknowledge receipt of the letters. GMAC also failed to timely respond to plaintiff's letter dated September 7, 2007. Actual damages for purposes of RESPA encompass emotional distress, but whether plaintiff can adequately quantify any emotional distress damages and whether plaintiff would receive any statutory damages based on any pattern or practice of noncompliance are issues reserved for trial.

C. *State Statutory Claims*

1. *Violation of Deeds of Trust Act (Fourth Cause of Action)*

The contours of plaintiff's claim under the Deeds of Trust Act are unclear. In her Amended Complaint, plaintiff alleged that MERS "cannot demonstrate that it is the beneficiary [of the deeds of trust] as defined by statute," that FATIC "is not authorized to act on behalf of the lender or any entity that was a party to the subject Deed of Trust," and that ETS "is not authorized to act on behalf of the lender or any entity that was a party to the subject Deed of Trust." Amended Complaint at ¶¶ 7.2-7.4 (docket no. 3). Defendants, however, have provided copies of the Deeds of Trust, naming MERS as the beneficiary, and a copy of an Appointment of Successor Trustee, which was recorded in Snohomish County, indicating that FATIC had been appointed trustee by MERS, as successor to Transnation Title Co. Exhs. C & D to Zeitz Decl. (docket nos. 78-4 & 78-5); Exh. A to De La Torre Decl. (docket no. 80-2).

In response to defendants' motion, plaintiff has not offered any evidence disputing MERS's status as beneficiary or FATIC's status as trustee, and has not cited any authority undermining ETS's status or authority to act as FATIC's agent for purposes of foreclosure proceedings. *See Buse v. First Am. Title Ins. Co.*, 2009 WL 1543994 (W.D.Wash.) (holding that, although the Deeds of Trust Act limits who may serve as a trustee of a deed of trust, it does not restrict who may act as a trustee's agent, and that the Deeds of Trust Act explicitly allows trustees to use agents). Instead, in response to defendant's motion, plaintiff has attempted to alter the nature of her Deeds of Trust Act claim, and now contends that FATIC and ETS violated the statute and/or their fiduciary duties by representing to plaintiff that they could not stop or postpone the trustee's sale. Plaintiff, however, cannot in her briefing change the fundamental character of her pleadings. Moreover, plaintiff points to no specific provision of the Deeds of Trust Act that she alleges FATIC and/or ETS violated, and the current rendition of her statutory claim appears duplicative of her separately pleaded claim against FATIC and ETS for breach of fiduciary duty, as well as of her claim against FATIC for misrepresentation. Thus, defendants' motion for summary judgment is GRANTED IN PART and plaintiff's Fourth Cause of Action is DISMISSED with prejudice.

2. *Violation of Consumer Protection Act ("CPA") (Sixth Cause of Action)*

*7 To establish a violation of the CPA, plaintiff must prove (i) defendants engaged in an unfair or deceptive act or practice; (ii) such act or practice occurred within a trade or business; (iii) such act or practice affected the public interest; (iv) plaintiff suffered an injury to her business or property; and (v) a causal relationship exists between defendants' act or practice and plaintiff's injury. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 785-93, 719 P.2d 531 (1986). In her Amended Complaint, plaintiff pleaded her CPA claim in conclusory fashion, merely reciting the elements of a CPA claim, and failing to identify with particularity any unfair or deceptive trade practice in which defendants have allegedly engaged. *See* Amended Complaint at ¶¶ 9.2-9.6 (docket no. 3). Based on the deficiency of plaintiff's pleading, defendants have moved for summary judgment.

In response, plaintiff contends that GMAC's unfair or deceptive practices consisted of violations of RESPA's disclosure and QWR requirements. *See Brazier v. Sec. Pac. Mortgage Inc.,* 245 F.Supp.2d 1136, 1142 (W.D.Wash.2003) (holding that failure to make timely disclosures as required by federal statutes such as TILA and RESPA constitutes an unfair or deceptive act or practice for purposes of Washington's CPA). Plaintiff alleges that GMAC failed to provide a HUD-1 settlement statement at closing as required by RESPA. Plaintiff, however, did not plead in her Amended Complaint any RESPA or CPA claim predicated on nondisclosure of a HUD-1. Indeed, plaintiff acknowledges that she has no private right of action or remedy for such RESPA violation, and that she seeks to use this RESPA violation only as evidence of an unfair practice in connection with her CPA claim. Plaintiff cannot do so, though, because she waited too long to give notice of the HUD-1 claim. Discovery closed a month before defendants filed the pending motion for summary judgment, and defendants would be prejudiced if plaintiff were now allowed to proceed on the previously undisclosed theory that GMAC violated the CPA by not complying with RESPA's HUD-1 provisions.

In contrast, plaintiff did plead a RESPA claim based on violation of the QWR response requirements, and plaintiff explicitly incorporated the allegations of that cause of action into her CPA claim. *See* Amended Complaint at ¶ 9.1 (docket no. 3). In their briefing on the pending motions, however, the parties did not fully address whether failures to acknowledge or respond to QWRs constitute either per se unfair or deceptive trade practices or trade practices that are unfair or deceptive because they have the "capacity to deceive a substantial portion of the public." *See Hangman Ridge,* 105 Wash.2d at 785-86, 719 P.2d 531 (1986); *see also Panag v. Farmers Ins. Co.,* 166 Wash.2d 27, 37 n. 3, 204 P.3d 885 (2009). The parties are directed to discuss this issue, as well as the other elements of a CPA claim, in their trial briefs, which are currently due on November 23, 2009.

***8** As to her CPA claim against FATIC and ETS, plaintiff alleges that FATIC's and ETS's unfair or deceptive practices consisted of making misrepresentations concerning their authority (or lack thereof) to stop or postpone the trustee's sale. Plaintiff, however, has failed to explain how such representations were unfair or deceptive, how they affected the public interest, or how they caused any injury to plaintiff's property. Thus, plaintiff has not presented sufficient evidence or analysis to demonstrate the existence of an issue for trial concerning her CPA claim against FATIC and ETS. Defendants' motion for summary judgment is GRANTED IN PART, and plaintiff's Sixth Cause of Action against FATIC and ETS is DISMISSED with prejudice. Plaintiff may proceed to trial on her Sixth Cause of Action against GMAC, but her claim is limited to any violations of the QWR provisions of RESPA, and it may not be predicated on the alleged failure to provide a HUD-1 statement.

D. *State Tort Claims*

Defendants raise three types of defenses to plaintiff's tort claims. First, defendants contend that

plaintiff's failure to pay amounts due into the Court's Registry, as a result of which the Court dissolved the preliminary injunction and permitted foreclosure, constituted a waiver of all of plaintiff's claims. Second, defendants assert that the economic loss rule bars plaintiff's infliction of emotional distress and unconscionability claims. Third, defendants challenge whether plaintiff has put forward sufficient proof of her claims. These arguments will be addressed seriatim.

1. *Waiver*

Washington courts have held that a borrower or grantor of a deed of trust who fails to employ the procedures of the Deeds of Trust Act to enjoin a foreclosure or trustee's sale waives the right to contest the underlying obligations on the foreclosed property. [FN4] *Plein v. Lackey,* 149 Wash.2d 214, 67 P.3d 1061 (2003); ***Brown v. Household Realty Corp.,* 146 Wash.App. 157, 189 P.3d 233 (2008)**; *CHD, Inc. v. Boyles,* 138 Wash.App. 131, 157 P.3d 415 (2007). These decisions are based on the following three goals of the Deeds of Trust Act: (i) to promote an efficient and inexpensive nonjudicial foreclosure process; (ii) to ensure an adequate opportunity for interested parties to prevent wrongful foreclosure; and (iii) to secure the stability of land titles. ***Brown,* 146 Wash.App. at 169, 189 P.3d 233**. Although the waiver doctrine bars claims that contest the underlying debt or obligation, it does not preclude a borrower or grantor from challenging, in a post-sale action, the procedures of the foreclosure or trustee's sale. *CHD,* 138 Wash.App. at 139, 157 P.3d 415. Thus, the task before the Court is to determine the nature of plaintiff's claims, which will indicate whether they have been waived.

> FN4. The legislature recently modified the waiver doctrine to exempt claims of fraud, misrepresentation, CPA violations, and failure to comply with the Deeds of Trust Act, thereby permitting such claims to be brought within the earlier of two years after a foreclosure sale or the applicable statute of limitations even when the borrower or grantor failed to seek an injunction of the foreclosure sale. *See* 2009 Wash. Legis. Serv. Ch. 292, § 6 (S.B. No. 5810) (codified at RCW 61.24.180). The effective date of this amendment was July 26, 2009, which was after the foreclosure sale at issue in this case and after the Trustee's Deed was recorded. The new statute contains no indication that it has any retroactive effect. Moreover, the amendment does not appear to apply; it governs only "foreclosures of owner-occupied residential real property," RCW 61 .24.180(3), and at the time the property at issue was foreclosed, plaintiff no longer resided in it, but rather had moved to Idaho.

As pleaded, plaintiff's claims against GMAC for breach of fiduciary duty, intentional and negligent infliction of emotional distress, and unconscionability involve the underlying obligation, not the foreclosure procedures. In the First Cause of Action, plaintiff asserts that GMAC breached a fiduciary duty by "talking the Moons into an '80/20' loan" and failing to aid or cooperate with plaintiff after her husband died. Amended Complaint at ¶ 4.4 (docket no. 3). In the Seventh and Eighth Causes of Action, plaintiff alleges that GMAC Mortgage Corp.'s callous attitude and unwillingness to work with her following her husband's death caused her emotional distress. *Id.* at ¶¶ 10.2 & 11.2. In the last, unnumbered claim, which the Court will denominate the Tenth Cause of Action, plaintiff contends that the second mortgage was unconscionable due to *inter alia* its "significantly higher" rate. *Id.* at ¶¶ 13.3-13.4. All of these claims seek relief from the underlying obligation, and plaintiff is deemed to have waived them by failing to take the steps necessary to maintain the injunction against foreclosure. [FN5]

> FN5. Plaintiff asserts that waiver does not apply because she obtained an injunction,

> which was later dissolved, citing for support a comment written by a law student in 1984, which opined that "a party who unsuccessfully attempted to enjoin the sale should not be held to have waived the right to contest the completed sale." Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington,* 59 Wash. L.Rev. 323, 336 (1984). No Washington court has yet adopted this student's view, but even were it a valid proposition, lack of success in initially obtaining an injunction differs substantially from the situation here, where plaintiff "fail[ed] to show that she made a good faith effort to comply with the conditions of the injunction" and failed to "explain why she has not or cannot make partial monthly payments." Order at 7 (docket no. 46). In essence, plaintiff allowed the injunction to lapse, and waiver of her claims challenging the underlying obligation is the corollary to such behavior. *See* ***Brown,*** **146 Wash.App. at 169, 189 P.3d 233** ("To except tort or other claims for money damages from the waiver provision would frustrate the purposes of the Act because lenders understandably may not be willing to utilize a non-judicial foreclosure procedure in which the trustee's sale bars any deficiency judgment but leaves the lender subject to potential liability arising out of the underlying obligation even after the property securing the deed of trust has been sold.").

***9** In contrast, plaintiff's claims against FATIC and ETS for breach of fiduciary duty, infliction of emotional distress, and misrepresentation predominately relate to the foreclosure process. In essence, plaintiff alleges that FATIC and/or ETS made misrepresentations concerning their authority to postpone the foreclosure and failed to adequately comply with the Snohomish County Superior Court's order enjoining foreclosure. These claims fall outside the scope of the waiver doctrine. Defendants' motion for summary judgment on the basis of waiver is therefore GRANTED IN PART as to GMAC and DENIED IN PART as to FATIC and ETS. Plaintiff's First, Seventh, Eighth, and Tenth Causes of Action against GMAC are deemed waived and are DISMISSED with prejudice.

2. *Economic Loss Rule*

Defendants assert that the economic loss rule precludes plaintiff's claims against FATIC and ETS for intentional and negligent infliction of emotional distress. The economic loss rule limits parties to their contractual remedies when a loss potentially implicates both tort and contract relief. *Alejandre v. Bull,* 159 Wash.2d 674, 682, 153 P.3d 864 (2007). The rule bars recovery for alleged breach of tort duties when a contractual relationship between the parties exists and the losses at issue are purely economic. *Id.* at 683, 153 P.3d 864. Plaintiff, however, did not have a contractual relationship with either FATIC or ETS, and defendants' motion for summary judgment based on the economic loss rule as to the Seventh and Eighth Causes of Action against FATIC and ETS is DENIED.

3. *Sufficiency*

As to the four remaining claims against FATIC and ETS, namely breach of fiduciary duty, intentional and negligent infliction of emotional distress, and misrepresentation, the Court must assess whether plaintiff has presented sufficient evidence to demonstrate an issue for trial. All four claims involve the same factual allegations, namely that FATIC and/or ETS told plaintiff's attorney they had no authority to postpone the foreclosure sale and that FATIC and/or ETS did not take the actions necessary to postpone the sale after the Snohomish County Superior Court issued an injunction. The parties appear to agree that a trustee of a deed of trust owes fiduciary duties to both the mortgagee/beneficiary and the mortgagor/grantor. *Cox v. Helenius,* 103 Wash.2d 383, 389, 693 P.2d 683 (1985). The parties dispute, however, whether FATIC or

ETS breached any duties, made any misrepresentations, or did anything improper that caused plaintiff emotional distress.

In support of her claims, plaintiff offers ETS's file notes indicating that Myron Ravelo, a Default Team Lead with ETS, spoke with plaintiff's attorney, Shelly Crocker, on May 22, 2008, and advised her that ETS "do[es] not have the authority to make any payment arrangements nor postpone the sale without the consent of the lender GMAC." Exh. 10 to Davis Decl. (docket no. 86); *see also* Ravelo Decl. at ¶¶ 1 & 6 (docket no. 79). Plaintiff also submits a declaration of her former attorney, Zeshan Khan, who indicates that, on May 27, 2008, he obtained an order restraining the trustee's sale, which he served on Transnation Title Insurance Co. (which was no longer the trustee on the date in question), and that, on May 30, 2008, he drove to the Snohomish County Courthouse and saw plaintiff's property still listed for auction. Khan Decl. at ¶¶ 4 and 5 (docket no. 88). Mr. Khan further states that he presented the restraining order to the auctioneer and "stopped the sale from taking place." *Id.* at ¶ 6.

***10** Defendants contend that the listing of plaintiff's property on the auctioneer's sheet is not evidence of FATIC's or ETS's failure to comply with the restraining order, but rather is consistent with one of the provisions of the Deeds of Trust Act, which states:

> The trustee has no obligation to, but may, for any cause the trustee deems advantageous, *continue the sale* for a period or periods not exceeding a total of one hundred twenty days *by* (a) *a public proclamation at the time and place fixed for sale in the notice of sale* and if the continuance is beyond the date of sale, by giving notice of the new time and place of the sale by both first class and either certified or registered mail, return receipt requested, to the persons specified in subsection (1)(b)(i) and (ii) of this section ....

RCW 61.24.040(6) (emphasis added). Defendants assert that plaintiff's property remained on the auctioneer's sheet because the trustee was required to publicly announce at the time stated in the notice of sale that the sale was being continued. Plaintiff provides no authority or evidence to the contrary, and defendants' position appears consistent with the Deeds of Trust Act, to the extent the trustee (FATIC via its agent ETS) chose to continue the sale in the manner set forth in RCW 61.24.040(6). *See* RCW 61.24 .130(6) ("The issuance of a restraining order or injunction shall not prohibit the trustee from continuing the sale as provided in RCW 61.24.040(6)."). Thus, plaintiff has not put forward sufficient evidence to demonstrate that the listing of plaintiff's property on the auctioneer's sheet constituted a breach of FATIC's and/or ETS's fiduciary duties, and plaintiff's infliction of emotional distress claims relating to this allegation are likewise lacking in merit.

As to the statements by Mr. Ravelo indicating to plaintiff's attorney that FATIC and/or ETS had no authority to "make any payment arrangements nor postpone the sale without the consent of the lender GMAC," plaintiff fails to explain how such representation was inaccurate, misleading, or a breach of fiduciary duty. The only case cited by plaintiff is *Cox v. Helenius,* 103 Wash.2d 383, 693 P.2d 683 (1985), which is distinguishable. In *Cox,* the plaintiffs, a husband and wife, purchased a swimming pool for their home in Seattle. To secure payment for the pool, they executed a deed of trust for their home, naming the attorney for the pool contractor as trustee. Shortly after the work was completed, the pipes installed by the pool contractor collapsed, causing sewage to back up into the home. The pool contractor failed to repair the work and the plaintiffs spent additional funds to fix the problem. The plaintiffs' attorney sent a letter to the pool contractor demanding that it reconvey the deed of trust and pay for the damage resulting from its defective work. The plaintiffs withheld payments on the note secured by the deed of trust. The trustee sent the plaintiffs notice of default. The plaintiffs then filed suit. The trustee appeared in the action as attorney of record for the pool contractor. He sub-

sequently gave notice of and conducted a foreclosure sale, at which his secretary bid $11,783 on behalf of the pool contractor, and the winning bidder, a then-disbarred attorney, paid one dollar more. At the time of the sale, the home was worth between $200,000 and $300,000.

***11** In *Cox,* the Supreme Court held that the trustee had violated his fiduciary duty to the plaintiffs by failing to either (i) inform them that their lawsuit did not itself operate to restrain the trustee's sale or (ii) delay the foreclosure until the plaintiff's action against the pool contractor was resolved. *Id.* at 390, 693 P.2d 683. Moreover, the trustee should not have also acted as the pool contractor's attorney. *Id.* Although the trustee in *Cox* was admonished by the Supreme Court for not delaying the foreclosure sale, the conclusion does not follow that all trustees of all deeds of trust have authority to postpone a foreclosure sale without the consent of the beneficiary. The key fact distinguishing *Cox* from this case, as well as from the garden-variety foreclosure situation, is the trustee's position as both the trustee of the deed of trust and the attorney of record for the beneficiary in an action in which the obligation secured by the deed of trust was being challenged. Because the trustee was also the attorney for the beneficiary, he presumably had authority to delay the foreclosure sale, not in his capacity as trustee, but as the representative of the beneficiary. *Cox* simply does not support plaintiff's contention that FATIC or ETS breached any fiduciary duty or made any misrepresentation when Mr. Ravelo informed plaintiff's attorney that, without GMAC's consent, neither FATIC nor ETS could cancel the sale and, as a result, her claims for breach of fiduciary duty, intentional or negligent infliction of emotional distress, and misrepresentation fail. Defendants' motion for summary judgment is GRANTED IN PART, and plaintiff's Second, Seventh, Eighth, and Ninth Causes of Action against FATIC and/or ETS are DISMISSED with prejudice.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment, docket no. 76, is GRANTED IN PART and DENIED IN PART, plaintiff's motion for summary judgment against GMAC, docket no. 83, is GRANTED IN PART and DENIED IN PART, and plaintiff's motions for summary judgment against the remaining defendants, docket nos. 84 and 85, are DENIED.

IT IS SO ORDERED.

Slip Copy, 2009 WL 3185596 (W.D.Wash.)

END OF DOCUMENT

Attachment B

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Estoppel and Waiver

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Part
Two. Waiver

VIII. Kinds of Rights and Privileges Subject to Waiver

Topic SummaryCorrelation TableReferences

§ 214.Statutory rights or benefits

Parties can waive statutory rights and protections,[98] and both substantive and procedural statutory rights may be waived.[99] Statutory rights should ordinarily be waived only by clear affirmative words or actions,[1] and at least one state requires a waiver of statutory rights must be express and explicit.[2] In some states a flexible approach has been adopted regarding acceptable form of voluntary waivers when statutory rights, rather than constitutional rights, are at issue.[3]

Where there is a statutory duty to be performed by those charged with administering that statute, such a law established for a public reason cannot be waived or circumvented by private act or agreements.[4] Further, a statutory right may not be waived or released if such waiver or release contravenes the purpose of the statute.[5]

When a statute contains provisions that are founded upon public policy, such provisions cannot be waived by a private party if such a waiver thwarts the legislative policy which the statute was designed to effectuate.[6] The protection of statutes designed to protect the public as well as individuals cannot be waived by an individual.[7]

Where a legislature permits a particular, limited waiver of right upon satisfaction of set of conditions, it intends that no other related waivers be permitted.[8]

[FN98]Ellis v. General Motors Acceptance Corp., 160 F.3d 703 (11th Cir. 1998); Ramsey v. City of Sand Point, 936 P.2d 126 (Alaska 1997).

Absent an affirmative indication in a statute of Congress' intent to preclude waiver, a court presumes that statutory provisions are subject to waiver by voluntary agreement of the parties. U.S. v. Mezzanatto, 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697, 40 Fed. R. Evid. Serv. (LCP) 1220 (1995), on remand to, 54 F.3d 613 (9th Cir. 1995) and (distinguished by, U.S. v. Burch, 156 F.3d 1315 (D.C. Cir. 1998)) and (distinguished by, U.S. v. Young, 1999 WL 1005001 (N.D. Iowa 1999)).

Forms

Statutory right waived. 8 Am. Jur. Legal Forms 2d, Estoppel and Waiver § 102:20.

[FN99]First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver, 937 P.2d 855 (Colo. Ct. App. 1996), reh'g denied, (Oct. 10, 1996) and cert. denied, (May 19, 1997).

[FN1]Matter of Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973 (Del. Ch. 1997).

[FN2]In re Jack/Wade Drilling, Inc., 213 B.R. 493, 139 O.G.R. 505 (Bankr. W.D. La. 1997).

[FN3]People v. Leonor, 245 A.D.2d 22, 665 N.Y.S.2d 76 (1st Dep't 1997), appeal denied, 92 N.Y.2d 855, 677 N.Y.S.2d 85, 699 N.E.2d 445 (1998).

[FN4]Soares v. Max Services, Inc., 42 Conn. App. 147, 679 A.2d 37 (1996), certification denied, 239 Conn. 915, 682 A.2d 1005 (1996).

As to the limitation on waiver of rights in violation of public policy or affecting the rights of others, see § 210.

[FN5]ABC, Inc. v. PrimeTime 24, Joint Venture, 17 F. Supp. 2d 478 (M.D.N.C. 1998), aff'd in part, vacated on other grounds in part, 184 F.3d 348, 51 U.S.P.Q.2d (BNA) 1451 (4th Cir. 1999), on remand to, 52 U.S.P.Q.2d (BNA) 1352, 1999 WL 781611 (M.D.N.C. 1999).

[FN6]In re Tulsa Energy, Inc., 111 F.3d 88 (10th Cir. 1997).

[FN7]Asbury Arms Development Corp., v. Florida Dept. of Business Regulations, Div. of Florida Land Sales and Condominiums, 456 So. 2d 1291 (Fla. Dist. Ct. App. 2d Dist. 1984).

[FN8]In re Marriage of Fell, 55 Cal. App. 4th 1058, 64 Cal. Rptr. 2d 522 (2d Dist. 1997), reh'g denied, (July 11, 1997) and review denied, (Sept. 3, 1997) and (distinguished by, In re Marriage of Jones, 60 Cal. App. 4th 685, 70 Cal. Rptr. 2d 542 (5th Dist. 1998)).

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